No. 195.

IN THE SUPREME COURT OF THE UNITED STATES

THE TERRITORY OF ARIZONA,
Plaintiff and Appellee,

vs.

THE PERSONS, LANDS, REAL ESTATE AND PERSONAL PROPERTY DESCRIBED IN THE DELINQUENT LIST OF THE COUNTY OF MARICOPA FOR THE YEAR, 1893-94,
Defendant and Appellant.

BRIEF OF DEFENDANT AND APPELLANT

OCTOBER TERM, 1894.

HARVEY S. BROWN,
Attorney for Defendant and Appellant,
The Maricopa & Phoenix R. R. Co.

Filed this ..... day of ..... 1894.

..... Clerk.

By ..... *Deputy Clerk.*

R. S. CRANDALL PRINTING COMPANY, WASHINGTON, D. C.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

THE TERRITORY OF ARIZONA,
Plaintiff and Appellee,
vs.
THE PERSONS, LANDS, REAL ESTATE AND PERSONAL PROPERTY DESCRIBED IN THE DELINQUENT LIST OF THE COUNTY OF MARICOPA FOR THE YEAR 1888–89,
Defendant and Appellant.

October Term, 1894.

No. 195.

Brief of Defendant and Appellant.

This is an action *in rem* against the Maricopa & Phœnix Railway Company "to enforce a lien against 24.16 miles of main track, with franchise and right-of-way and the main track thereon, beginning at the point where said main track crosses the boundary line of Pinal and Maricopa counties, and running thence in a northern direction to Tempe, and from thence to the town of Phœnix in said Maricopa county, rolling stock, telegraph lines, station buildings, structures at Tempe and other points, reservation structures, depot and improvements at Phœnix, for the taxes, penalties, interest and costs thereon."

The following sections of the Revenue Act of said territory will sufficiently show the authority under which said proceedings took place:

REVISED STATUTES OF ARIZONA, 1887.

TITLE LVI.

REVENUE.

(Approved March 10, 1887.)

LEVY OF TAXES.

"SEC. 2627. There shall be levied annually, upon the real and personal property within this territory, the following taxes: For territorial revenue, thirty-five cents on each one hundred dollars of assessable property, when no other rate is directed by the territorial board of education, and such further sum or sums as shall be necessary to meet the interest and payments of the territorial bonds as provided by law; and upon the same property the board of supervisors of each county is also hereby authorized and empowered to levy and collect for county purposes such additional and special taxes, not exceeding two dollars upon each one hundred dollars' value of taxable property, and such further sum or sums as shall be necessary to meet the interest and payments of the county bonds as provided by law.

"SEC. 2628. The board of supervisors of each county shall, on the fourth Monday in August of each year, assess the amount of taxes that shall be levied for county purposes, designating the amount which shall, on each one hundred dollars of taxable property, real and personal, be levied for such purposes, and shall add thereto the amount required by this act to be levied for territorial purposes. The board of supervisors of the respective counties shall, prior to the first Monday of March of each year, cause to be prepared suitable books for the use of the assessor, in which he shall enter the assessment rolls, as herein provided; and said books shall contain suitable printed or written heads, and be ruled to conform with the form of the assessment roll as provided in this act.

"SEC. 2629. *Every tax levied under the provisions or authority of this act upon any real property is hereby made a lien upon the property assessed, which lien shall attach on the first Monday in March in each year, and shall not be satisfied or removed until such taxes, penalty, charges and interest are all paid, or the property has absolutely vested in a purchaser under a sale for taxes. And which lien shall be prior and superior to all other liens and incumbrances upon the said real property.*"

Property Liable to Taxation.

"Sec. 2630. Nothing in this act shall be construed to require or permit double taxation, and all property of every kind and nature whatsoever within this territory shall be subject to taxation, except:

"*First*—All lands and lots of ground, with buildings, improvements and structures thereon, belonging to the territory or any municipal corporation, or to any county of the territory, *and all lands belonging to the United States or this territory, and all buildings and improvements belonging to the United States or this territory.*

"*Second*—Court-houses, jails, town halls, council chambers, houses occupied by fire companies and their apparatus, and other public structures and edifices, and all squares and lots kept open for health or public use, or for ornament, belonging to any county, city, town or village in this territory; public libraries, colleges, school-houses and other buildings owned by the public for the purpose of education, with their furniture, libraries and all other equipments, and the lots or lands thereto appurtenant and used therewith, and so long as the same shall be used for that purpose; *provided*, that when any of the property mentioned in this subdivision is private property, from which a rent or valuable consideration is received for its use, the same shall be taxed as other property.

"*Third*—Public hospitals, asylums, poor-houses and other charitable or benovelent institutions for the relief of the indigent or afflicted, and the lots or lands thereto appurtenant, with all their fixtures and equipments; all grounds and buildings belonging to agricultural societies, so long as the same shall be used for that purpose only, and without pecuniary gain.

"*Fourth*—Churches, chapels, and other buildings for religious worship, with their furniture and equipments, and the lots of ground and improvements appurtenant thereto and used therewith; *provided*, rent is not paid for such grounds, and so long as the said ground and improvements shall be used for such purposes only without yielding rent.

"*Fifth*—Cemeteries and graveyards set apart and used for the purpose of interring the dead, except such portions of such cemetery or graveyard as are owned as individual property, and for which charges are made.

"*Sixth.*—The property of widows or orphan children, not to exceed the amount of one thousand dollars to any one family, where their total assessment does not exceed two thousand dollars.

"SEC. 2631. The term 'real estate,' whenever used in this act, shall be taken to mean and include the ownership of, or claim to, or possession of, or right of possession to, any land within the territory; and the claim by possession of any person, firm, corporation, association or company to any land shall be listed under the head of real estate, provided the term land as used in this section shall not be so construed as to include mining claims, either lode or placer; the term personal property, whenever used in this act, shall be deemed and taken to mean, and it is hereby declared to mean and include, all property of whatsoever kind or nature not included in the term real estate, as said term is defined in this section. All personal property in the hands of any trustee, agent, administrator, executor or receiver, and all personal property mortgaged or pledged, shall, for the purpose of taxation, be deemed to be the property of the person who has the possession thereof. Whenever solvent debts are assessed, the person assessed may deduct therefrom his liabilities."

"SEC. 2632. All taxable property must be assessed at its full cash value. The term 'cash value,' whenever used in this act, shall mean the amount at which the property would be taken in payment of a just debt due from a solvent debtor. Land, and improvements thereon, shall be separately assessed.

"SEC. 2649. Except as in this act otherwise provided, all property shall be assessed in the name of the real owners, if the same can be reasonably ascertained, and, if not, then in the name of 'unknown owners,' with a particular description of the property assessed sufficient for identification; and the property of corporations or companies constructing canals, ditches, flumes, plank roads, gravel roads, turnpike roads, telegraph lines, and similar improvements, shall be assessed to the company or corporation in the respective counties in which said improvement shall be situated, and railroad property shall be assessed as follows: *On the first Monday in June in each year the territorial board of equalization shall meet at the office of the territorial auditor, and they shall meet from day to day thereafter until the business of said board as hereinafter provided shall be accomplished.* The duties of said board shall be to assess all taxable property

in this territory belonging to railway corporations, except lots or parcels of real estate owned by the road within each county, and improvements thereon, and other improved property not connected with the operation of such road and located in any county which shall be taxed in the county where situate. The president, vice-president, general superintendent, auditor or general officer of any corporation operating any railway in this territory shall furnish said board, on or before the first Monday in June in each year, a statement signed and sworn to by one of such officers, showing in detail the whole number of miles of railroad in each county, also the whole number of miles owned, operated or leased in the territory by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind, and the value located in each county in the territory; *second*, also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight and other cars or property owned by such railway, and on railways which are a part of lines extending beyond the limits of this territory. The returns shall show the actual proportion of the amount and full cash value of the rolling stock in use on the corporation's line which is necessary for the transportation of the freight and passengers, and the operation of the railroad in this territory, during the year for which the return is made. The return shall also show the amount and value of property hereinafter designated in this section, and such further information shall be furnished as the board may in writing require. If said officers fail to make such statement, said board shall proceed to assess the property of the corporation so failing, and shall add thirty per cent to the value thereof as ascertained and determined by the said board. *The said property shall be valued at its full cash value, and assessments shall be made upon the entire railway within this territory, and shall include the franchise, right-of-way, roadbed, bridges, culverts, rolling stock, depots, station grounds, buildings, telegraph lines, and all other property, real and personal, exclusively used in the operation of such railway.* In assessing said railway and its equipments, said board shall take into consideration all matters connected with said road necessary to enable them to make a just and equitable assessment of said railway property. *On or before the third Monday in June in each year said board shall transmit to the board of supervisors of each county, through or into which any rail-*

way may run, a statement showing the length of the main track of such railway within the county, and the assessed value per mile of the same as fixed by a pro-rata distribution per mile of the assessed value of the whole property herein specified, with a description of the whole of said assessed property within the county by metes and bounds, or other description sufficient for identification. And the said assessment and *pro rata* shall be made with reference to the value of the property belonging to said railway other than the main track, situate in each county and municipality through or into which said railway extends. Where the railroad of a railroad corporation lies in several counties, its rolling stock must be apportioned between them so that a portion thereof may be assessed in each county, and each county's portion must bear to the whole rolling stock the same ratio which the number of miles of the road in such county bears to the whole number of miles of such road lying in this territory. *Said board of supervisors shall cause the county assessor to enter said statement with the said description upon the assessment roll of said county under the proper heads therefor, with the total value of said assessed property carried out.* At the first meeting of the board of supervisors held after said statement is received by it, they shall make, and cause to be entered in its minutes, an order stating and declaring the length of the main track, and the assessed value of such railway, lying in each municipal corporation within their county through which their railway runs, as fixed by the said territorial board of equalization, which shall constitute the taxable value of said property for taxable purposes, and the clerk of said board of supervisors shall transmit a copy of said order to the city council or trustees of such municipal corporation.

"All such railway property shall be taxable upon said assessment by the same officers and for the same purposes as the property of individuals within such counties and municipalities. If any railway company or any person shall not be satisfied with the assessment of the property belonging to said company by the territorial board of equalization, it or they may appear before said board at its meeting in August and show why such assessment should be lowered or changed."

"SEC. 2652. It shall be the duty of the assessor to prepare a tax list or assessment roll, alphabetically arranged, in the book or books furnished him by the board of supervisors for that purpose, in which book or books shall be

listed or assessed all the real estate and personal property within the limits of the county, and in said book or books he shall set down in separate columns :

" *First*—The name of the taxable inhabitants, firms, incorporated companies or associations, in alphabetical order, if known ; if unknown, the property shall be assessed to ' unknown owners ; ' and if any person shall refuse to make a statement of his property under oath, as required by this act, that fact shall be noted under his name.

" *Second*—All real estate taxable to each inhabitant, firm, incorporated company or association, described by metes and bounds, or by common designation or name: if situate within the limits of any city or any incorporated town, describing by lots or fractions of lots ; if without said limits, giving the number of acres as nearly as can conveniently be ascertained, and the location and township where situate ; all improvements upon public lands, describing as nearly as possible the location of such improvements ; *provided*, that when two or more parties claim or give a description of the same land, it shall be assessed to each party making such claim or giving such description, according to the estimated value of the claims of each.

" *Third*—The cash value of real estate, and the improvements thereon.

" *Fourth*—The cash value of all improvements on real estate where the same is assessed to a person other than the owner of said real estate.

" *Fifth*—The cash value of all personal property taxable to each person.

" *Sixth*—The total value of all property taxable to each, and no further description of personal property than that required by the foregoing provisions of this section shall be needed or be requisite to render the assessment binding and effective ; and the description of real estate shall be sufficient if the same can be readily identified thereby.

" The form of the assessment roll shall be substantially as follows:

[COPY.]

"'ASSESSMENT ROLL ..... COUNTY, ARIZONA TERRITORY, FOR YEAR 18....

Taxpayer's Name.	Description of Personal Property.	Value of Personal Property.	Lands.					Value of Lands.	Value of Improvements.	City and Town Property.			Value of Lots.	Value of Improvements.	Total Valuation.	Remarks.
			Description.	Section.	Township.	Range.	Acres.			Lots.	Block.	Division, Addition or Town.				
Totals,																

"The assessor shall also, in a book, make a map or plan of the various blocks within any incorporated city or town, and shall mark thereon the various subdivisions as they are assessed, and in each subdivision he shall mark the name of the person to whom it is assessed."

"SEC. 2657. The territorial board of equalization shall consist of the territorial auditor, who shall be deemed to represent the judicial district in which he resides, and who shall be chairman of said board, and two other members who shall be appointed by the Governor, by and with the advice and consent of the legislative council, for the term of two years, or until their successors shall be appointed and qualified, any two of whom shall constitute a quorum for the transaction of business; and they shall, before entering upon the duties of their office, take the statutory oath of office, and file the same in the office of the secretary of the territory; said board shall be appointed, one from each of the judicial districts other than that in which the auditor resides." * * * * * *

DUPLICATE ASSESSMENT ROLL AND WARRANT FOR COLLECTION OF TAXES.—TAX COLLECTOR.

"SEC. 2660. As soon as the Board of Supervisors of each county shall have levied the taxes as provided in this act, they shall add up the colums of valuation and enter the total valuation of each description of property on the roll, and shall cause a true copy of said assessment roll to be made, to be styled a 'duplicate assessment roll,' with territorial, county and other taxes and totals of taxes to each person or name, carried out in separate money columns, and shall carefully foot up the several taxes therein levied, and shall give to the county treasurer a statement thereof, who shall immediately charge the amount of such taxes to the tax collector, and the said board of supervisors shall charge the same to the county treasurer. The chairman of the board of supervisors shall annex thereto immediately under his hand a warrant commanding the tax collector to collect from the several persons named in said roll the several sums mentioned in the last column of such roll, opposite their respective names, on or before the third Monday of December then next. Which said 'duplicate assessment roll,' and also the plat or map book, shall be delivered to the tax collector on or before the second Monday in September.

"As soon as the board of supervisors shall have made the determination and estimate provided for in this act they shall proceed to assess taxes for the amount estimated, adding thereto, if in the counties wherein a percentage is allowed to the tax collector for collecting such taxes, the amount allowed according to law for collecting fees or expenses upon the taxable property of the county, according and in proportion to the individual and particular estimate and valuation as specified in the assessment roll for the year. In making such duplicate assessment roll the value and tax of each particular species of property, as assessed, shall be put down in separate columns, which shall constitute the tax roll for the year; and no informality in complying with the requirements of this act shall render proceedings for the collection of taxes illegal.

Said duplicate assessment roll may be in the following form:

"DUPLICATE ASSESSMENT ROLL.....COUNTY, FOR THE YEAR 18 ...

NAME OF TAXPAYER.	Description.	Section.	Township.	Range.	No. of Acres.	Lot.	Block.	Valuation of Real Estate.		Valuation of Improvements on Real Estate.		Tax on Real Estate and Improvements.		Valuation of Personal Property.		Tax on Personal Property.		Total Taxes.		Fees for Collection.		Total.		Remarks.
								$	c	$	c	$	c	$	c	$	c	$	c	$	c	$	c	

"Sec. 2661. The duplicate assessment roll, with the warrant of the chairman of the board of supervisors thereto affixed, shall be full and sufficient authority for the collector to collect the taxes therein levied."

COLLECTION OF DELINQUENT TAXES.

"SEC. 2685. On or before the first Monday in February the tax collector must publish the delinquent list, which must contain the names of the persons *and a description of the property delinquent, and the amount of taxes and costs due opposite each name and description*, with the taxes due on personal property added to taxes on real estate, where the estate is liable therefor, or the several taxes are due from the same person, and the year or years for which the same are due; said publication to be made in the newspaper designated by the board of supervisors, and the compensation therefor to be fixed by said board and paid by the county. The tax collector must append and publish with the delinquent list a notice that he will apply to the District Court held in and for said county, at the next ensuing term thereof, for judgment against the lands and real estate and personal property described in said list for said taxes, costs and interest, and for an order to sell the same for the satisfaction thereof; and shall also give notice that, on the Monday next succeeding the day fixed by law for the commencement of such term of the District Court, all the land and real estate and personal property, for the sale of which an order shall be made, will be exposed to public sale at the building where the District Court is held in said county, for the amount of taxes, interest and cost due thereon; and the advertisement published according to the provisions of this section shall be demed to be sufficient notice to the persons, parties, corporations or companies of the intended application for judgment, and of the sale of lands, real estate and personal property under the order of said court. That said tax list and notice shall be published not less than once a week for a period of four weeks previous to a term of the court at which judgment is prayed, the said publication to be in some newspaper, or supplement thereto, published in the same county, or, if there is none, then by posting a copy of said list and notice for such period in three public places in each precinct of the county; the whole of the advertisement shall be

contained in one edition of such newspaper and its supplement if such supplement is necessary; *provided*, that nothing herein contained shall prevent the tax collector from subsequently advertising and obtaining judgment on land, real estate or personal property that may have been omitted through no fault of the collector, or that may have been erroneously advertised or described in the first advertisement.

"SEC. 2686. Upon the completion of the publication and notice, the district attorney of the county shall file a complaint in the said District Court, entitling the action substantially as follows:

"'TERRITORY OF ARIZONA,

"'AGAINST

"'THE PERSONS, REAL ESTATE, LAND AND PROPERTY DESCRIBED IN THE DELINQUENT LIST OF THE COUNTY OF ....., FOR THE YEAR 18....'

"The said complaint shall set forth the fact of the delinquent list, its publication, and of the notice of application to the said court for judgment against the property described therein, and shall ask the judgment and decree of said court against the property described in said list for the taxes therein, and that the tax lien upon said property be foreclosed, and for a sale of the property to satisfy said judgment. The delinquent list shall be *prima-facie* evidence that the taxes therein are due against the property described in said list. Upon said publication and advertisement being made, and the filing of said complaint, the said District Court shall acquire full and complete jurisdiction over the lands, real estate and property described and contained in said delinquent list for all purposes whatever necessary to enable the said court to carry out the purposes and intention of this act.

"SEC. 2687. All applications for judgment and order of sale for taxes and special assessments on delinquent property shall be made at the term of the District Court following the said publication. If, from any cause, the court shall not be holden at the term at which judgment is prayed, the cause shall stand continued; and it shall not be necessary to re-advertise the list or notice required by law to be advertised before judgment and sale, but at the next term thereafter the court shall hear and determine the

matter; and, if judgment is rendered, the sale shall be made on the Monday specified in the notice, as provided in the preceding section, such Monday to be fixed by the county collector in the notice. If, for any cause, the collector is prevented from advertising and obtaining judgment at said term, it shall be held to be legal to obtain judgment at any subsequent term of said court; but, if the failure arises by the county collector's not complying with any of the requirements of this act, he shall be held on his official bond for the full amount of all taxes and special assessments charged against him; *provided*, that any such failure on the part of the county collector shall not be allowed as a valid objection to the collection of any tax or assessment, or to a rendition of judgment against any delinquent property included in the application of the county collector; *and provided further*, that on the application for judgment, at such subsequent term, it shall not be deemed necessary to set forth or establish the reasons of such failure; *and provided further*, that the tax collector may, at any time before judgment, collect any tax, with costs and percentage, appearing upon the delinquent roll.

"SEC. 2688. The court shall examine said list, and if defense (specifying in writing the particular cause of objection) be offered by any person interested in any of said property to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. The court shall give judgment for such taxes and special assessments, interest, penalties and costs as shall appear to be due, and such judgment shall be considered as a several judgment against each parcel of property, or part of the same, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such property against which judgment is given, which shall be substantially in the following form:

"'Whereas, due notice has been given of the intended application for a judgment against said property, and no sufficient defense having been made, or cause shown, why judgment should not be entered against the same for the taxes (special assessment, if any), interest, penalties and costs due and unpaid thereon for the year or years herein set forth, therefore it is considered by the court that judgment be and is hereby entered against the aforesaid property, or parts of the same, as the case may be, in favor of the

territory of Arizona for the sum annexed to each, being the amount of taxes (and special assessments, if any), interest, penalties and costs due severally thereon; and it is ordered by the court that the said property, or so much thereof as shall be sufficient to satisfy the amount of taxes (special assessments, if any), interest, penalties and costs annexed to them severally, be sold as the law directs.'

"Said order shall be signed by the judge. *In all judicial proceedings of any kind for the collection of taxes and special assessments all amendments may be made which, by law, could be made in any personal action pending in such court*, and no assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists, assessment rolls or duplicate assessment roll, or on account of the assessment rolls, tax lists or duplicate assessment rolls not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list, or duplicate assessment roll, without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls, tax lists or duplicate assessment roll, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be in the discretion of the court corrected, supplied and made to conform to law by the court; or by the person (in the presence of the court) from whose neglect or default the same was occasioned.

"SEC. 2690. The clerk of the District Court shall set forth in his judgment the name of the owner, if known, the description of the property, the total amount of judgment on each piece or parcel of property against which judgment shall be given, and the year or years for which the same is due, in the same descriptive order as set forth in the advertisement, and shall immediately make a copy of the judgment and order of the court, and certify under his official seal that such copies are correct, and deliver the same to the tax collector, which shall be the process on which all property, or any interest therein, shall be sold for taxes or special assessments.

matter; and, if judgment is rendered, the sale shall be made on the Monday specified in the notice, as provided in the preceding section, such Monday to be fixed by the county collector in the notice. If, for any cause, the collector is prevented from advertising and obtaining judgment at said term, it shall be held to be legal to obtain judgment at any subsequent term of said court; but, if the failure arises by the county collector's not complying with any of the requirements of this act, he shall be held on his official bond for the full amount of all taxes and special assessments charged against him; *provided*, that any such failure on the part of the county collector shall not be allowed as a valid objection to the collection of any tax or assessment, or to a rendition of judgment against any delinquent property included in the application of the county collector; *and provided further*, that on the application for judgment, at such subsequent term, it shall not be deemed necessary to set forth or establish the reasons of such failure; *and provided further*, that the tax collector may, at any time before judgment, collect any tax, with costs and percentage, appearing upon the delinquent roll.

"SEC. 2688. The court shall examine said list, and if defense (specifying in writing the particular cause of objection) be offered by any person interested in any of said property to the entry of judgment against the same, the court shall hear and determine the matter in a summary manner, without pleadings, and shall pronounce judgment as the right of the case may be. The court shall give judgment for such taxes and special assessments, interest, penalties and costs as shall appear to be due, and such judgment shall be considered as a several judgment against each parcel of property, or part of the same, for each kind of tax or special assessment included therein; and the court shall direct the clerk to make out and enter an order for the sale of such property against which judgment is given, which shall be substantially in the following form:

"'Whereas, due notice has been given of the intended application for a judgment against said property, and no sufficient defense having been made, or cause shown, why judgment should not be entered against the same for the taxes (special assessment, if any), interest, penalties and costs due and unpaid thereon for the year or years herein set forth, therefore it is considered by the court that judgment be and is hereby entered against the aforesaid property, or parts of the same, as the case may be, in favor of the

territory of Arizona for the sum annexed to each, being the amount of taxes (and special assessments, if any), interest, penalties and costs due severally thereon; and it is ordered by the court that the said property, or so much thereof as shall be sufficient to satisfy the amount of taxes (special assessments, if any), interest, penalties and costs annexed to them severally, be sold as the law directs.'

"Said order shall be signed by the judge. *In all judicial proceedings of any kind for the collection of taxes and special assessments all amendments may be made which, by law, could be made in any personal action pending in such court*, and no assessment of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists, assessment rolls or duplicate assessment roll, or on account of the assessment rolls, tax lists or duplicate assessment rolls not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax list, or duplicate assessment roll, without name, or in any other name than that of the rightful owner; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof; and any irregularity or informality in the assessment rolls, tax lists or duplicate assessment roll, or in any of the proceedings connected with the assessment or levy of such taxes, or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be in the discretion of the court corrected, supplied and made to conform to law by the court; or by the person (in the presence of the court) from whose neglect or default the same was occasioned.

"SEC. 2690. The clerk of the District Court shall set forth in his judgment the name of the owner, if known, the description of the property, the total amount of judgment on each piece or parcel of property against which judgment shall be given, and the year or years for which the same is due, in the same descriptive order as set forth in the advertisement, and shall immediately make a copy of the judgment and order of the court, and certify under his official seal that such copies are correct, and deliver the same to the tax collector, which shall be the process on which all property, or any interest therein, shall be sold for taxes or special assessments.

"SEC. 2691. Appeals from the judgment of the court may be taken to the Supreme Court of the territory on the party taking the appeal executing a bond to the territory of Arizona, with two or more sureties, to be approved by the court or judge, in some reasonable sum not less than double the amount of the judgment rendered in the District Court and the probable costs in the appellate court: conditioned that the appellant will prosecute his said appeal with effect, and will pay the amount of any tax, assessment, interest, penalties and costs which may finally be adjudged against the property involved in the appeal by any court having jurisdiction of the cause; *provided*, that the board of supervisors of any county, or other authority or person to whom any tax or assessment is due, may appeal to the Supreme Court without giving bond.

"SEC. 2692. In all cases of appeal to the Supreme Court from the judgment of the District Court for any taxes or assessments levied upon real estate, *the Supreme Court may render judgment against all property, or any particular part thereof, embraced in the appeal, for so much or such part of the taxes and assessments, or any particular tax or assessment, it may find to be legally charged against the same;* and in case it shall find any part of the taxes or assessments, or any particular tax or assessment, charged against the same, has not been legally charged, it may either remit said taxes or assessments, or particular tax or assessment, so found to be illegally charged, *or may reverse so much or such part of the judgment of the District Court as relates to said taxes or assessments, or particular tax or assessments, so illegally charged, and remand the same to said inferior court, that other proceedings may be had thereon, and in a proper case render such judgment as the District Court ought to have rendered.* When the judgment of an inferior court shall have been, or shall be, affirmed by the Supreme Court, or when judgment shall be rendered by the Supreme Court against any property embraced in such appeal, it shall be the duty of the clerk of the Supreme Court to make out and deliver to the clerk of the District Court, of the county from which such appeal is taken, a record of the property against which judgment is rendered or affirmed, which shall set forth the name of the owner, if known, the description of the property, with the same particularity and certainty as is contained in the record of appeal, and the total amount of the judgment on each parcel, and shall attach thereto a copy of the order of the Supreme Court and his certificate that such

record is correct, which shall be filed in the office of said clerk of the District Court, and shall be the record on which such property or any interest therein shall be sold for such taxes or assessments, or particular tax or assessment. The clerk of the District Court shall deliver a certified copy, under his official seal, of said record to the tax collector; and it shall be the duty of the county collector to proceed and sell the same for the amount of such judgment and costs, in the manner provided, when judgment is rendered by the District Court against delinquent property. The collector shall publish a general notice of such sale in a newspaper published in his county, if any such there be, and, if there be no such paper published in his county, he shall post a notice of such sale in three public places in the county, said notice to be so published once in such newspaper, or, if posted, at least three weeks previous to the day fixed for such sale. Upon the dismissal of any appeal, and upon filing in the office of the clerk of the District Court of the county from which the appeal is taken, a certified copy of the order of such dismissal, the said clerk shall issue an order of sale, or process for the sale, of the property embraced in such appeal, and it shall be the duty of the county collector to proceed and sell the same in the manner provided hereinbefore in cases of judgment rendered against property by the Supreme Court on the hearing of an appeal. In all cases of appeal taken to the Supreme Court from the District Court refusing judgment, and the decision of the District Court has been or shall be reversed, and the District Court shall be, by the order of the Supreme Court, directed to enter judgment against the property embraced in said appeal, it shall be the duty of the clerk of the Supreme Court to make and deliver to the clerk of the District Court of the county from which such appeal was or may be taken, a record thereof, and embracing all other matters as in case of a judgment being rendered by the Supreme Court; and the District Court shall, upon the presentation of such certified record, render judgment thereon, as directed by the Supreme Court, and like proceedings shall be had upon such record to the sale and collection of said judgment."

After final judgment against the property and notice of sale, it is made the duty of the collector to attend at the court-house at the designated time, and offer for sale separately each parcel of property in the said list in which the taxes have not been paid. After selling said property and recovering the taxes and

costs, it is made the duty of the collector to make out in duplicate a certificate dated on the day of sale in the name of the person assessed, a description of the property sold, the amount paid therefor, and that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed, and deliver one of the certificates to the purchaser, and the other must be filed in the office of the county recorder.

"SEC. 2697. On filing the certificate with the county recorder, the lien of the territory vests in the purchaser, and is only divested by the payment to him, or to the county treasurer for his use, of the purchase money and thirty per cent on the amount thereof.

"SEC. 2698. A redemption of the property sold (personal property excepted, the title of which shall at once vest in the purchaser) may be made by the owner or any party in interest within one year from the date of the purchase. When the redemption is made to the county treasurer, he must credit the amount paid to the person named in the collector's certificate, and pay it on demand to the person or his assignees."

"SEC. 2701. If the property is not redeemed within the time allowed by law for its redemption, the collector or his successor in office must make to the purchaser or his assignee a deed for the real estate sold, which deed shall vest a good and perfect title to said land in the purchaser or his assignee. The deed shall state the cause of sale, the amount sold, the price for which the real estate was sold, the name of the person, firm, company or corporation assessed, and from whom the taxes were due; *provided*, the name is known, and, if unknown, say 'unknown,' the same description of the land as is given in the order of sale and certificate of sale, and such other description as may be practicable for better identification.

"SEC. 2702. Deeds executed by the county collector, as aforesaid, shall be *prima-facie evidence, in all controversies and suits, in relation to the right of the purchaser, his heirs or assigns, to the real estate thereby conveyed, of the following facts:*

"*First*—*That the real estate conveyed was subject to taxation at the time the same was assessed, and had been listed and assessed in the time and manner required by law.*

"*Second*—That the taxes or special assessments were not paid at any time before sale.

"*Third*—That the real estate conveyed had not been redeemed from the sale at the date of the deed.

"*Fourth*—That the real estate was advertised for sale in the manner and for the length of time required by law.

"*Fifth*—That the real estate was sold for taxes or special assessments as stated in the deed.

"*Sixth*—That the grantee in the deed was the purchaser or assignee of the purchaser.

"*Seventh—That the sale was conducted in the manner required by law.*

"*And any judgment for the sale of real estate for delinquent taxes, rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment or decree, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered; and, as to all such questions, the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment.*

"SEC. 2704. *If the holder of a tax deed, or any one claiming under him by virtue of such tax deed, be defeated in an action by or against him for the recovery of the land sold, or the possession thereof, the successful claimant shall be adjudged to pay to the holder of the tax deed, or the party claiming under him by virtue of such deed, before such claimant shall be let into possession, the full amount of all money paid by the holder of said deed for the same, with all penalties and costs as allowed by law, including the costs of such deed, and the recording of the same, with interest at the rate of twenty per centum per annum on such amounts, and also the value of all improvements made by the said purchaser or person claiming under him, on such property, and shall decree the payment thereof within such reasonable time as may be determined by said court, and may also decree that and in default of such payment such lands, or a sufficiency thereof, be sold to pay the amount found to be due, or otherwise, as to the Court may seem just between the parties concerned. Such claim or amount so found to be due shall be and is hereby declared to be a lien upon such property included in said deed, and the same shall be bound for the payment thereof.*"

STATEMENT OF CASE.

The complaint herein avers that on the first Monday in June, 1888, the territorial board of equalization, as required by law, did list and assess and value all of the property of the railroad company at its full cash value, and that such *assessment was made on "all of said railroad in said territory, including main track, franchise, right-of-way, rolling stock, telegraph lines, station buildings, structures at Tempe and at other points, reservation structures, depot and improvements at Phœnix, and all other property, real and personal, exclusively used in the operation of said railway;"* and that on or before the third Monday in June, 1888, said board did transmit to the board of supervisors of said Maricopa county a statement showing the length of the main track of said railway in said county of Maricopa, to wit, 24.16 miles, and the assessed value thereof per mile, to wit, $7,000, as fixed by a *pro-rata* distribution per mile of the assessed value of the whole of the property therein specified, with a description of the whole of said assessed property within said county of Maricopa, owned, controlled and possessed by said railroad company during the said year 1888, by metes and bounds and other description sufficient for identification, subject to taxation in said county of Maricopa for said year 1888, and that the sheriff and *ex-officio* assessor of said county prepared a tax list or assessment roll, as required by section 2652 of the Revised Statutes of the territory, and on or before the third Monday in June, 1888, completed said tax list or assessment roll, and attached his certificate thereto, and delivered the same to the clerk of the board of supervisors of Maricopa county, and that the board of supervisors equalized the same as provided by law, and then avers the levying of the tax as provided by the laws of Arizona, and that before the last day of December, 1888, the tax collector of said county, as required by section 2684 of the Revised Statutes of Arizona, made out and completed a delinquent list of persons and property owing taxes to said county and territory for the year 1888, a copy of which is attached to said complaint.

That said delinquent list was published in the *Tempe News* for four successive weeks, with notice that he would appeal to the District Court held in and for Maricopa county on the first Monday in May, 1889, for judgment against the land and real estate and personal property described in said delinquent list, for said taxes, costs and interest, and for an order to sell the same for the satisfaction thereof; also, that on the Monday next succeeding the day fixed by law for the commencing of said term of

said court, to wit, May 13, 1889, all the land, real estate and personal property for the sale of which an order shall be made will be exposed to public sale at the building where the said District Court is held in the city of Phœnix, in the said county of Maricopa, in the territory of Arizona, for the amount of taxes, interest and costs due thereon. That said publication and notice were completed on the ..... day of ....., 1889, and that the persons, associations, corporations, firms and companies, and real estate and land and property mentioned and described in said delinquent list, still owe and have not paid (save those erased therefrom in red ink) to the said county and territory the taxes, penalties and interest and costs in said delinquent list respectively set opposite their names and descriptions thereon for the year 1888.

The prayer is as follows:

"Wherefore plaintiff prays the judgment and decree of this Court:

"1st. Against each specific piece or parcel of land, real estate, personal and other property in said delinquent list mentioned and described for the taxes due thereon respectively to said county and territory for the year 1888, as appears on said delinquent list; and,

"2nd. That the tax lien given by law upon each specific piece or parcel of land, real estate and other property in said delinquent list mentioned and described be foreclosed according to law; and,

"3rd. For the sale of each and every specific piece or parcel of land, real estate and other property in said delinquent list mentioned and described for the said taxes, penalty, costs and interest due thereon, as appears upon said delinquent list; and,

"4th. For all costs, penalties and interest which by law attach to each piece and parcel of said land, real estate and other property in said delinquent list described and mentioned for the non-payment of said taxes as aforesaid" (see trans., p. 4).

So far as this defendant is concerned the delinquent tax list of the county of Maricopa, territory of Arizona, for the year 1888, is as follows:

Name, description of the property, and costs.

* * * * * * *

Maricopa & Phœnix R. R. Co.—24.16 miles of main track with franchise and the right-of-way and the main track thereon, beginning at the point where said main track crosses the

boundary line of Pinal and Maricopa counties, and running thence in a northerly direction to Tempe, and from thence to the town of Phœnix, in said Maricopa county; rolling stock, telegraph lines, station buildings, structures at Tempe and other points, reservation structures, depot and improvements at Phœnix—$7,000 per mile, $2,069.78 (trans., p. 5).

The above-named defendant appeared and answered the complaint and averred:

> "1st. That said defendant corporation has paid all taxes legally and lawfully assessed against its property in the county of Maricopa for the tax year of 1888 and '89.
>
> "2nd. That said corporation was assessed for and on 24.16 miles of roadbed, main track and right-of-way in the county of Maricopa for the tax year of 1888 and '89, at the rate of $7,000 per mile; that, in fact, there are only 17.92 miles of said roadbed, main track and right-of-way within said county and territory subject to taxation; the balance—*i. e.*, 6.24 miles—being on and within the boundaries of the Maricopa and Pima Indian reservation, and *over which said corporation have a right-of-way, and over which said Indian reservation neither the territory of Arizona, the county of Maricopa, or this District Court, have any jurisdiction or control.*" * * *
>
> "That all taxes legally and justly chargeable against the said railroad property of defendant has been fully paid; that the sum charged remaining unpaid and for which judgment is prayed for,—*i. e.*, the sum of $1,971.23,—defendant alleges has been illegally and unjustly assessed and charged against the defendant and its property, and is no legal lien thereon" (trans., pp. 5 and 6).

The court found as facts: That the railroad company had been by the assessor listed and taxed on 24.16 miles of main track, right-of-way, road-bed, etc., at a valuation of $7,000 per mile in the county of Maricopa for the tax year of 1888 and 1889. *That of said 24.16 miles of main track, etc., 6.24 miles lie on and within the boundaries of a strip of land within the territory commonly known as the Gila River Indian reservation or Indian reserve of the Maricopa and Pima Indians. And that the railroad company had paid all taxes assessed against said company for the said tax year, except the tax on said 6.24 miles of railroad which lie within and on said Indian reservation, and except the costs, penalties and interest hereafter included in the judgment, there being due thereon the sum of $1,113.84 unpaid, and costs, interest and penalties; and it was further found that the said railroad company was liable for territorial and county taxes levied and assessed on said 6 24–100ths*

miles of main track, road-bed, right-of-way, etc., for the tax year 1888–89, and that judgment should be entered in favor of the plaintiff and against said Maricopa and Phœnix Railroad Company's property for the said sum of $1,113.84 and costs, and for costs, interest and penalties upon said sum, and upon other delinquent taxes aggregating with said sum the amount of $1,318.59, and it is so ordered (trans., p. 7).

By the judgment rendered in said action it was found:

"That all of the allegations of the application or complaint in the action, and all the averments therein contained, are true and correct.

"That the said taxes set forth in such delinquent list against the Maricopa and Phœnix Railroad Company have not been paid, and that the same, together with the interest, penalties and costs, are due and payable to the territory of Arizona from said Maricopa and Phœnix Railroad Company, in the amount herein specified:

"Total tax and penalties, $2,069.98; interest from 6th March, 1889, to February 6, 1890, at 7 per cent, $106.20; $857.39 paid on February 6, this date, leaving a total balance of $1,318.59."

And "that *the same is a valid lien upon said property of the said Maricopa and Phœnix Railroad Company, to wit, the 24.16 miles of main track, with franchise and right-of-way and the main track thereon, beginning at the point where said main track crosses the boundary lines of Pinal and Maricopa counties, and running thence in a northerly direction to Tempe, and from thence to the town of Phœnix, in said Maricopa county, rolling stock, telegraph lines, station buildings, structures at Tempe and other points, reservation structures, depot and improvements at Phœnix, for the taxes, penalties, interest and costs above mentioned.* And it was, by said judgment, ordered, adjudged and decreed that the above-described property of the said Maricopa and Phœnix Railroad Company, or so much thereof as may be necessary to pay the taxes, penalties, interest and costs due against it, be sold by the tax collector of the county of Maricopa at the time and in the manner provided by law" (trans., pp. 7–8).

From this judgment the defendant appealed to the Supreme Court of the territory of Arizona, and made the following assignment of errors: (see trans., p. 9).

"1. The court erred in rendering a judgment for the plaintiffs for the reasons, viz: The court had no jurisdiction. The judgment is against law and unsustained by the findings of fact made and filed by the Court.

"2. The judgment rendered is excessive, in this: Included in the judgment is [are] 'penalties and interest,' both of which are unauthorized by law. The correct sum unpaid is correctly set out in the findings of fact" (trans., pp. 9–10).

The Supreme Court of said territory affirmed the judgment with one exception: it disallowed $106.20, the amount of interest on the taxes which was embraced in the judgment of the court below. From the judgment of the Supreme Court of the territory the defendant appealed to this Honorable Court.

It will be observed that by the findings of the court there were listed and taxed to the defendant 24.16 miles of main track, right-of-way, road-bed, etc.; and that 6.24 miles of the same were within the Indian reservation; and *that the company had paid all taxes assessed against said company for the said tax year, except the tax on said 6.24 miles of railroad which lie within and on said Indian reservation* (trans., p. 7).

Notwithstanding this finding the court, instead of rendering judgment against the 6.24 miles of railroad within the Indian reservation, rendered judgment against the entire 24.16 miles of railroad; or, in other words, rendered a judgment and order of sale against, 17.92 miles of railroad upon which the taxes had been paid.

POINTS AND AUTHORITIES.

We submit that the judgment is erroneous and should be reversed, because:

I.

That the judgment is erroneous because the property affected thereby is not described by metes and bounds or other description sufficient for identification.

There is no description of the property by metes and bounds, either in the delinquent list, complaint or judgment; neither is there any other description sufficient for identification. There is no attempt to define the width of the right-of-way, the character or amount of rolling stock, nor what structures and improvements other than station buildings were assessed at

Tempe or Phœnix, nor what station buildings and structures were assessed at other points, nor what other points had structures or stations. Nor is it possible to ascertain from either what are called "*reservation structures*," nor is it possible from either the delinquent list or judgment for any man on earth to tell what property was adjudged to have a valid lien thereon, nor what amount was claimed for penalties or costs. Neither does it appear what costs, interest or penalties were due upon other delinquent taxes, or what other property was referred to as being subject to a lien for interest, costs and penalties, or either interest, costs or penalties.

TO CREATE A LIEN FOR TAXES ON REAL ESTATE THERE MUST BE A DESCRIPTION THEREOF SUFFICIENT TO SHOW ITS LOCATION AND EXTENT, AND PAROL EVIDENCE CANNOT BE RESORTED TO FOR THE PURPOSE OF SUPPLYING A DEFECTIVE DESCRIPTION.

In the case of the *People* vs. *Chicago & Alton R. R. Co.*, 96 Ill., 369, it was held that:

> "Property assessed for taxation must be described by reference to Government surveys, or by metes and bounds; or if land is divided into lots, then by reference to authenticated plats. If a piece of land is designated as a lot, when there is no plat to which reference can be had to determine from what tract it has been formed, no judgment can be rendered against it for taxes, and it is not capable of location."

In the case of *Keane* vs. *Cannovan*, 21 Cal., at page 302, the court said:

> "It is not sufficient that a similar description in a contract or conveyance between individuals might be shown by parol evidence to have been intended for particular premises. The description must be certain of itself, and not such as to require evidence *aliunde* to render it certain. The statute requires the collector, in his publication of the delinquent list, to give such a condensed description of the property that it may be easily known. *A description which cannot be made intelligible without regard to extrinsic evidence is not one of this character.*"

In the case of the *People* vs. *Mahoney*, 55 Cal., 286, the court affirmed the doctrine laid down in the case of *Keane* vs. *Cannovan*, and quoted that portion of the opinion hereinbefore given, and added:

"Certainty in the description is required to apprise the owner that his property is advertised for sale, and to enable him to prevent the sale by the payment of the taxes thereon, and to impart information to bidders of the actual extent and location of the premises to be sold. All subsequent proceedings depend upon this certainty. 'An inaccurate or uncertain description defeats every step subsequently taken, and, as we have already said, the uncertainty cannot be cured by evidence *aliunde*.'"

The case of the *People* vs. *Cone and the Real Estate assessed*, 48 Cal., 427, was an action brought to recover taxes for the year 1870. The court said:

"The assessment sought to be enforced in this action is void on its face. It describes by metes and bounds a large tract of land as that which is assessed, but excepts from the assessments several parcels of the larger tract which had been previously conveyed, and the excepted portions are not described by metes and bounds, nor in any manner except by a reference to the recorded deeds. It is impossible to ascertain from the assessment on its face what particular lands were intended to be assessed and what excepted. In order to determine with any reasonable certainty the particular tract assessed, it would be necessary to make a laborious search of the records, and possibly to invoke the aid of a surveyor. The deeds referred to in the assessment might prove, on examination, to be so vague in the descriptive calls as to leave it doubtful what lands they included. * * * The statute requires that the description, either by common designation or name or by metes and bounds, shall appear on the face of the assessment roll, so that by inspecting it the owner and all other persons may know what particular land is assessed."

In the case of the *People* vs. *Pico*, 20 Cal., 596, which was an action brought for the collection of delinquent taxes, it was held that:

"No action can be maintained for a tax on real estate unless the assessment has sufficiently designated the property to enable a proper description of it to be given in the complaint."

In the case of the *People* vs. *Mariposa Company and the Real Estate known as Las Mariposas Estate or Fremont Grant*, 31

Cal., 196, the Legislature passed an act for the purpose of legalizing defective assessments. The action in this case was brought against said company and about 43,000 acres of land with the improvements thereon, to recover delinquent taxes amounting to $7,088.23½, and to enforce the lien thereon. The land was described in the complaint in the action as unsold portions of eleven leagues of land known as *Los Mokelamos*. The court held that the act was passed for the purpose of legalizing defective assessments, and not for the purpose of legalizing defective complaints in pending actions, and held that the action could not be maintained.

In the case of *Sanford* vs. *The People*, 102 Ill., 374, it was held that:

> "To create a lien for taxes on real estate it must be described so it may be located and found."

In the case of the *Inhabitants of Orono* vs. *Veazie*, 61 Me., 431, it was held that:

> "An assessment of taxes upon land of a non-resident thus described: 'two acres of land, house, boom and privileges, shore of lots 1 and 2,' is void, for uncertainty in the description; nor is parol evidence admissible to identify the premises intended."

In the case of *Bowers* vs. *Andrews*, 52 Miss., 597, where land at a tax sale was described as follows:

> "I, R. J. Ross, tax collector of Madison county, have this day, according to law, sold the following lands, there being no other property on which to levy or make the taxes due on said land, to wit: Lot and residence in Madison station, for the taxes assessed to the reputed owner thereof, Thomas McMahon, for the year 1871,"

it was held that the description of the land was insufficient, and that the deed was void for uncertainty, and parol evidence was inadmissible to help it out.

In *Orton* vs. *Noonan*, 23 Wis., 102, it was held that:

> "In a tax deed words necessary to identify the land will not be supplied by intendment, nor will any part of the description be rejected as surplusage."

And, further, that:

> "The Legislature cannot make a deed valid which by law was void as between the parties to it at the time of the passage of the act."

In the case of *Griffin* vs. *Creppin*, 60 Me., 270, it was held that:

> "In the sale of land for non-payment of taxes, the land assessed and sold must be accurately described."

In the case of *Curtis* vs. *Supervisors of Brown County*, 22 Wis., 169, it was held that:

> "The counsel for the plaintiff are fully sustained by authority and correct in the position, that a false or mistaken description of the land, in proceedings to enforce the collection of taxes, avoids the sale, certificate or deed. The reasons are obvious. The officers are engaged in the exercise of mere, naked statutory powers, which must be strictly pursued, and the execution of which can only be shown by the *acts* of the officers themselves, evidenced in the manner prescribed by the statute. The certificate is the sole evidence of the land sold, and the deed, of that conveyed; and hence parol evidence cannot be received to aid or correct a description which is false or mistaken. For the same reason, also, no part of the description can be rejected as surplusage, nor words omitted be supplied, as in similar transactions between private individuals."

The lien given by the statute constitutes a charge only upon each separate tract for the taxes assessed against it, and a judgment declaring a lien upon several tracts for the aggregate taxes due on all would be erroneous.

Edmondson vs. *City of Galveston*, 53 Tex., 161.
Jodon vs. *City of Brenhan*, 57 Tex., 655.

See also,

Tallman vs. *White*, 2 N. Y., 66.

II.

That the land upon which the railroad is constructed through the Indian reservation is exempt from taxation by the provisions of section 2630 of the Revised Statutes of Arizona, as the same belongs to the United States.

Said section reads as follows:

"SEC. 2630. Nothing in this act shall be construed to require or permit double taxation, and all property of every kind and nature whatsoever, within this territory, shall be subject to taxation, except,

"*First*—All lands and lots of ground, with buildings, improvements and structures thereon, belonging to the territory or any municipal corporation, or to any county of the territory, and *all lands belonging to the United States* or this territory, and all buildings and improvements belonging to the United States or this territory."

That said land is also exempt from assessment and taxation under the provisions of section 1851 of the Revised Statutes of the United States, which reads as follows:

"The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no laws shall be passed interfering with the primary disposal of the soil; *no tax shall be imposed upon the property of the United States*, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

III.

That the judgment of sale against 17.92 miles of track upon which the taxes had been paid was clearly erroneous, as there can be no lien upon property for delinquent taxes when the taxes thereon have been paid.

After finding that the M. & P. R. R. Co. was listed and taxed on 24.16 miles of main track, etc., and that of said main track 6.24 miles lie within the territory commonly known as the

Gila River Indian reservation, or Indian reserve of the Maricopa and Pima Indians, the court found, third: that the railroad company had paid, before the date of the findings, all taxes assessed against said company for the said tax year, except the tax on said 6.24 miles of railroad which lie within and on said Indian reservation, except the costs, penalties and interest therein included in the judgment, etc., and thereupon the court rendered judgment against said railroad company, which is clearly against and unsustained by the said findings of fact which were made and filed by the court, in this, that by said judgment the delinquent taxes are declared to be a valid lien on 24.16 miles of track, etc., and that the same, or so much thereof as may be necessary to pay the taxes, penalties, interest and costs due against it be sold by the tax collector of the county of Maricopa.

IV.

That the judgment rendered is clearly against and unsustained by the findings of fact made and filed by the Court in this, that by the judgment the delinquent taxes are declared to be a valid lien on 24.16 miles of track, etc.; while by the findings it appears that the said railroad company had, before the date of the findings, paid all taxes assessed against said company for the said tax year, except the taxes on 6.24 miles of railroad which lie within and on said Indian reservation.

V.

The lands within an Indian reservation cannot be taxed either by a State or territorial government. The fee is in the United States, and the right of occupancy is in the Indians.

In the case of *United States* vs. *Cook*, 19 Wallace, at page 593, this Honorable Court said:

> "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession when abandoned by the Indians attaches itself to the fee without further grant."

In the case of the *Kansas Indians* (5 Wall., 737), the State of Kansas assessed the lands held in severalty by individual Indians under patents of the United States, pursuant to treaties made with the Shawnee, Wea and Miami tribes, the State claiming that the tribal organizations of these tribes had been broken in upon by their intercourse with the whites, in the midst of whom the Indians were, etc. In reply to this contention of the State, the court, at pages 755, 756, said:

> "If they have outlived many things they have not outlived the protection offered by the Constitution, treaties and laws of Congress. It may be that they cannot exist much longer as a distinct people in the presence of the civilization of Kansas, but *until they are clothed with the rights and bound to all the duties of citizens*, they enjoy the privilege of total immunity from State taxation."

In the case of the *New York Indians* (5 Wall., 761), the State law authorized the county authorities to enter upon the reservations, survey and lay out roads, construct and repair them, construct and repair bridges, assess and collect taxes to meet the expenses, and survey the lands for the purpose of making the assessments; and in pursuance of these powers the proper officers of the counties had levied taxes upon these properties for large sums for the years 1840, 1841, 1842 and 1843, and although there was a provision in the law that "the soil of the lands, in default of payment of the taxes, shall not affect the right of occupancy of the Indians," the court, upon this point, said that:

> "Tax titles purporting to convey these lands to the purchaser, even with the qualification suggested—that the right of occupation is not to be affected—may well embarrass the occupants and be used by unworthy persons to the disturbance of the tribe."

And the court held that the whole of the taxes assessed upon these reservations were illegal and void.

In the case of *Commissioners of Douglas County et al.* vs. *The Union Pacific Ry. Co.* (5 Kansas, 615), the Supreme Court of that State held that:

> "As long as the title to land lying within an Indian reserve remains in the United States or in the Indians, or in both, the land is not taxable by the State."

It was further held that:

> "A mere contingent, conditional and inchoate equity, obtained by a railroad company in such lands but which does not amount to a title either legal or equitable, does not so divest the United States of their title to the land as to subject the same to taxation."

The case of *Parker* vs. *Windsor* (5 Kansas, 362), was a case where:

> "The defendant in error was in possession of and had improved certain lands which he had purchased of the Central Branch of the Union Pacific Railroad Company, who held under treaty with the Kickapoos of 1862 (13 U. S. Stat., 623), the same being a part of the Kickapoo reserve. * * * * The assessor of the township assessed four hundred dollars as personal property tax for homestead improvements on said land, consisting of a dwelling, out-houses, fences, and lands 'broken up,'—this by virtue of the tax laws of the State."

The lands had not been patented.

At page 373 the court said that:

> "Legal title has not passed because the patent has not yet been issued, and the equitable title has not passed because it has not yet been paid for, and because it is clearly the intention of the parties, as indicated in the treaty, that such title shall not pass until the land is fully paid for. It is true that the purchaser has a contingent or conditional equity in the land, but here where we use the words 'equitable title,' we mean the entire, absolute and unconditional equities, leaving nothing in the United States but the mere naked legal title, without any equities It cannot be said that a party has a complete, equitable estate as long as he is in danger of forfeiting the same."

The court further held that:

> "The improvements, which consisted of a dwelling house, a barn, out-buildings, fences, and a portion of the soil 'broken up,' were at common law a part of the real estate;"

and that neither the lands nor the improvements thereon could be encumbered by a tax, and that neither could be sold for taxes, and that a tax lien could not be obtained against them.

In the case of *Moore* vs. *The Board of County Commissioners of Sweetwater County* (2 Wyoming, 8), it was held that the territory had no right to tax the property of a post trader at a military post situated on an Indian reservation, and the tax paid could be recovered back.

In *Swope* vs. *Purdy* (1 Dillon, 349), it was held that:

> "A sale of land for taxes in Indian reservation not subject to State taxation is void."

In *Farrington* vs. *Wilson* (29 Wis., 394), in speaking upon this subject the court said:

> "No State government ever dreamed of taxing such lands, or that it was necessary to protect them by a specific exemption from the operation of any law which the Legislature could pass. It was totally incompetent for the Legislature of this State, under the Constitution of the United States and that of this State, to tax such lands. They were never regarded as taxable anywhere. Such lands, subject to the Indian right of occupancy, which the Government of the United States alone has the power to extinguish, are a part of the public soil and domain of the United States, over which, by the articles of compact above referred to, between this State and the United States, this State forever relinguished and surrendered all right and privilege of disposition and control."

In the case of *Foster* vs. *Board of County Commissioners of Blue Earth County* (7 Minnesota, 140), it was held that the territory of Minnesota had no power to tax the property of licensed traders with the Winnebago Indians, within the Winnebago reservation, and that where a county directed the collection of such taxes and received into its treasury the proceeds thereof, an action shall lie against it for the recovery of the sum so received.

In the case of *State* vs. *Ross*, 7 Yerger, 74, it was held that a Cherokee native—to whom the rights of citizenship have not been extended—keeping a retail store within the limits of the Cherokee nation is not subject to be taxed.

But let us for a moment examine the Act of Congress granting the right-of-way to the railroad, and see what rights the railroad company obtained under the same. Is the right-of-way, so-called, an easement or a simple license, and is the land over which the right-of-way passes subject to a servitude?

On the 17th of January, 1887, the Congress of the United States passed an act entitled, "An act to grant the Maricopa & Phœnix Railway Company of Arizona the right-of-way through the Gila River Indian reservation" (see statutes at large, 361). By section 1 of this act the said railway company was:

> "Authorized and empowered with the right to locate, construct, own, equip, operate, use and maintain a railway and telegraph and telephone line through the Indian reservation situated in the territory of Arizona known as the Gila River reservation, occupied by the Pima and Maricopa Indians."
>
> "SEC. 2. A right-of-way one hundred feet in width through said Indian reservation is hereby granted to the said Maricopa & Phœnix Railway Company, and a strip of land two hundred feet in width, with a length of three thousand feet, in addition to said right-of-way, is granted for stations for every ten miles of road, no portion of which shall be sold or leased by the company; with the right to use such additional ground, where there are heavy cuts or fills, as may be necessary for the construction and maintenance of the road-bed, not exceeding one hundred feet in width on each side of said right-of-way, or as much thereof as may be included in said cut or fill; * * * * *and provided, further, that before any such lands shall be taken for the purposes aforesaid, the consent of the Indians thereto shall be obtained in a manner satisfactory to the President of the United States.*"

The other provisions of the act refer to the duties of the company in laying out and mapping said right-of-way, and protecting the rights of the Indians in various particulars; but section 11 provides as follows:

> "*Congress may at any time amend, add to, alter or* REPEAL THIS ACT."

In the first place, it nowhere appears in this record, except in the opinion of the Supreme Court, that the Indians ever gave their consent in a manner satisfactory to the President of the United States, or ever gave their consent at all, to the locating of the road through said reservation.

First Wash. on Real Prop. at page 4 lays down the following:

> "The road-bed, the rails fastened to it, and the buildings at the depots of railroads are real property;"

and *Trust Co.* vs. *Hendrickson* (25 Barb., 493), lays down the same doctrine.

And if these improvements were erected without the assent and agreement of the Indians, they became at once a part of the realty, and could not be assessed to appellant.

1st Wash. on Real Prop. pp. 5, 6.
First Parish, etc., vs. *Jones*, 8 Cush., 184.
Oakman vs. *Dorchester Mutual, etc.*, 98 Mass., 57.
Howard vs. *Fessenden*, 14 Allen, 124.
Poor vs. *Oakman*, 104 Mass., 309, 316, 317.
Madigan vs. *McCarthy*, 108 Mass., 376.

If a stranger enter upon the land of another and make improvements by erecting buildings, they become the property of the owner.

Crest vs. *Jack*, 3 Watts, 238.

We respectfully submit that the right conferred by this act is a simple license and not an easement.

Washburn's Easements and Servitudes, page 6, has the following:

> "There is an important distinction to be observed between an easement and a license, lest the apparent similarity in their mode of enjoyment should mislead the inquirer at times as to their character. *An easement always implies an interest in the land in or over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattle one, according to its duration, whereas, whatever right one has in another's land by license may, as a general proposition, be said to be revocable at will by the owner of the land in which it is to be enjoyed.* * * * * The foregoing distinction between a license and an easement may be illustrated by the effect given to a conveyance of the land in or over which it is to be enjoyed. A conveyance of land by the grantor, who has given a parole license to another to enjoy a right in the nature of an easement in it, *ipso facto* determines the license; whereas, whoever takes an estate upon which a servitude has been imposed, holds it subject to the same servitude and in the same manner as it was held by his grantor."

In *Ex parte Coburn*, 1 Cowen, 568, the court said:

> "A right-of-way is an assignable property. It is a real or chattle interest, according to the term of its duration, and the former is well known in the law as that sort of real property belonging to the class of incorporeal hereditaments. Not so of a license to enter upon another's land without consideration. This is not an interest; it is a mere authority, *revocable at any moment*, not in its nature assignable, but limited to the person of the grantee."

In the case of *Wolfe* vs. *Frost*, 4 Sandford's Chancery Reports, at pages 91, 92, the court said:

> "A license is an authority to do a particular act or series of acts, upon another's land, without possessing any estate therein. A claim for an easement must be founded on prescription or a grant by deed, for it is a permanent interest in another's land. A license, when executed, will prevent the owner of the land from maintaining an action of case or trespass for the acts done under it; but it is revokable at pleasure, and will not be a defense to any act done after it is revoked. Thus, it is applicable only to the *temporary* occupation of land or dominion over it, and confers no right or interest in the land."

The Civil Code of California defines two classes of servitudes or easements.

SEC. 801, C. C., shows what servitudes are attached to land. Said section is as follows:

> "The following land burdens, or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements: 1. The right of pasture; 2. The right of fishing; 3. The right of taking game; 4. The right of way; 5. The right of taking water, wood, minerals and other things; 6. The right of transacting business upon land; 7. The right of conducting lawful sports upon land; 8. The right of receiving air, light or heat, from or over, or discharging the same upon or over land; 9. The right of receiving water from or discharging the same upon land; 10. The right of flooding land; 11. The right of having water flow without diminution or disturbance of any kind; 12. The right of using a wall as a party wall; 13. The right of receiving more than natural support from adjacent land or things affixed thereto; 14.

The right of having the whole of a division fence maintained by a coterminous owner; 15. The right of having public conveyances stopped, or of stopping the same on land; 16. The right of a seat in church; 17. The right of burial."

SEC. 802, C. C., shows what servitudes are not attached to land. Said section is as follows:

"The following land burdens, or servitudes upon land, may be granted and held, though not attached to land:

"1. The right to pasture, and of fishing and taking game; 2. The right of a seat in church; 3. The right of burial; 4. The right of taking rents and tolls; 5. The right-of-way; 6. The right of taking water, wood, minerals or other things."

[Note to section 802]: "Servitudes which affect lands are divided into two kinds, real and personal.

"The servitudes enumerated in section 801 are real servitudes imposed for the benefit of the estate to which the right belongs, and resting upon the estate on which the obligation is imposed; but the servitudes enumerated in section 802 are *personal*—they are not attached to a dominant estate, but to the person for whose benefit they are imposed.

"Though the terms easements and servitudes are often used by common law writers indiscriminately, it will be seen from the definitions given that a servitude may exist and yet two elements necessary to constitute an easement be wanting, to wit: 1. Benefit to corporeal property; and, 2. The dominant estate.

"Servitudes in which these elements are wanting are classed by the common law writers under the head of 'rights in gross.'"

"An easement is a privilege. An easement is not a right to the land or to any corporeal interest in land, and thus a grant of the right-of-way does not convey the soil over which the way passes to the grantee."

Goddard on Easements, p. 4.

"The right-of-way is not a right to the land, and the soil is in no way the property of the owner of the right-of-way."

Goddard on Easements, p. 73.

"Public rights-of-way are rights in gross and not easements; for it has been explained that rights in gross are not easements, it being an essential characteristic of easements that they are enjoyed in respect to a dominant tenement. For a similar reason private rights-of-way not appurtenant to dominant tenements are not in England considered easements, but rights in gross. The right is not a right to the land or to any corporeal interest in the land, and the soil is in no way the property of the owner of the right."

Goddard on Easements, pp. 72, 73.

From these authorities it is apparent that here there is no servitude attached to the land; but it is a servitude not attached to land, and hence is a personal servitude or a right in gross.

But what is this, a right in gross, an easement or a license? A license may be acquired by parol (which is at any time revocable) or by grant, where the power of revocation is contained in said grant; but upon this subject we refer to pages 90 and 91 of Goddard's Law of Easements:

"A mere license in the nature of an easement may be acquired in any way by which permission can be understood to have been given, and whether there is any writing in existence to prove the grant or not. The case of *Hewlins* vs. *Shippam*, above noticed, shows that such an interest may be created by word of mouth only, and, though it is scarcely necessary to cite them, there are other authorities to the same effect. So, also, there are authorities to show that licenses can be given by deed as well as by writing not under seal. If licenses can be conferred by word of mouth only, it hardly requires demonstration that they may be conferred by writing; but it may be asked, if a license in the nature of an easement is given by deed, in what respect does the interest granted differ from an easement, and is not the interest conferred really an easement? Although the interest is conferred by deed it may frequently only be a license that the grantee acquires, but whether it is so depends upon the words employed in the deed. The nature of licenses is very clearly explained in the judgment of the Court of Exchequer in the case of *Wood* vs. *Ledbitter*, and it will be seen from that judgment that mere licenses may be given by deed, as well as by writing not under seal or by word of mouth, for it is there said, 'But suppose the case of a parol license to come on

any land, and there to make a water course to flow on to the land of the licensee. In such a case there is no valid grant of the water course, and the license remains a mere license, and therefore capable of being revoked.' On the other hand, if such a license were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse, and if it did, then the license would be irrevocable."

A license or right of entry is not taxable as real estate against the licensee.

In *Iron Works* vs. *Cone*, 56 Vermont Reports, 603, where a licensee had the right to go upon a third party's land to cut and remove the wood and timber for twelve years and to build the necessary roads and buildings, it was held that the licensee had not such an interest; that it can be appraised and set in the list as realty, the purchaser having the power to remove the buildings, and that the assessment for taxes upon it was void.

In *Hughes* vs. *Vail*, 57 Vermont Reports, 41, a slate quarry was leased for the purpose of manufacturing roofing slate, and it was held that an assessment against the lessee was invalid; that he had no interest in the real estate described in the contract, and it was error in the listers to put it in the list, and that the assessment for taxes upon it was absolutely void.

In the case of *De Witt et al.* vs. *Hays*, 2 Cal. Rep., 463, it was held that a right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise, or incorporeal hereditament and an uncertain profit issuing out of the realty.

While the Constitution provides that "all property shall be taxed," etc., still the *quo modo* is a matter of legislative control, and the statute must be steadily followed. The interests of the plaintiff do not come under the head of personal property or real estate, as defined by the statute. That the Legislature has omitted to provide for taxes upon this species of property, and the naked right on this class of property cannot be assessed, *eo nomine;* and,

In the case of *The City of Fall River* vs. *County Commissioners of Bristol*, 125 Mass., 567, it was held that if a reservoir company owns merely a right to flow land, this is not an estate liable to taxation.

Wood vs. *Ledbitter*, 13 N. & W., 838.

Tomlins' Law Dictionary gives the following definition of "License."

"A power or authority given to a man to do some lawful act; and is a personal liberty to the party to whom given, which cannot be transferred over; but it may be made to man, or his assigns, etc. (12 Hen., 7, 25). There may be a parol license, as well as by deed in writing; *but if it be not for a certain time, it passes no interest* (2 Nels. Abr., 1123). And if there be no time certain in the license, as if a man license another to dig clay, etc., in his land, but doth not say for how long, the license may be countermanded; though if it be until such a time, he cannot (Poph., 151). If a lessor license his lessee (who is restrained by covenant from aliening without license) to alien, and such lessor dies before he aliens, this is no countermand of the license; so it is if the lessor grants over his estate (Cro. Jac., 133). But where a lord of a manor for life granteth a license to a copyhold tenant to alien, and dieth, the license is destroyed and the power of alienation ceaseth (1 Inst., 52). Copyhold tenants leasing their copyhold for a longer time than one year are to have a license for it, or they incur a forfeiture of their estates (1 Inst., 63). If any license is given to a person and he abuses it, he shall be adjudged a trespasser *ad initio* (8 Rep., 146).

"A grants to B a way over his ground, or license to go through it to the church; by this none but B himself may go in it. But if one give me license to go over his land with my plough, or to cut down a tree therein, and take it away, by this I may take what help is needful to do the same. So if it be to hunt, and kill, and carry away deer; not if it be to hunt and kill only (12 Hen., 7, 25; 13 Hen., 7, 8; 8 Rep., 146).

"A mere license to enjoy a privilege in land may be granted without deed, and even without writing, notwithstanding the Statute of Frauds (Say., 3; Palm., 81; 8 East., 310; 7 Bing., 682. See further, Copyhold, Lights, Trespass, Way, etc.).

"A license is an authority to do a particular act or series of acts upon another's land, without possessing any estate therein. *A claim for an easement must be founded on prescription or a grant by deed, for it is a permanent interest in another's land.* A license when executed will prevent the owner of the land from maintaining an action of case or trespass for the acts done under it, but it is *revocable at pleasure*, and will not be a defense to any act done after it is revoked. Thus, it is applicable only to the temporary occupation of land or dominion over it, and confers no

right or interest in the land. On the other hand, an agreement that one may enter and use land for a year is more than a license. It is an estate in the land. So of an agreement that one will not build on his own land so as to obstruct his neighbor's light and prospect from the windows in the adjoining house of the latter."

Anderson's Dictionary of Law, under the head of "License," gives the following:

"Permission or authority, as a license to do a particular thing. * * *

"More specific significations of license are: 1st, Authority given to do some one act or a series of acts on the land of another, without passing any estate in the land, as a license to hunt on another's land, or to cut down trees. A mere license passes no interest—only makes an action lawful which without it would have been unlawful. If the instrument passes an interest it is a grant.

"Imports, leave, permission, sufferance, authorization; as a license to enter upon land to erect a party wall. In this sense license is contrasted with easement, which implies an interest in another's land distinct from the ownership of the soil, and *enjoyable at all times*, and with lease which transfers the right to take the profits of the land."

Abbott's Law Dictionary gives the following:

"As used in the law of real property, a license has by earlier and respected authorities been defined to be an authority to do an act on the land of another without passing any estate in the land. It may be oral as well as written, or even implied from acts; hence the word often, but not necessarily, signifies a writing conferring such authority.

"In the real property use of the word the distinctions are important between executory licenses, which are permissions given but not yet performed (these are generally revocable unless founded on a consideration or coupled with an interest), and executed licenses, which are such as have been acted upon. These cannot be revoked. A license is technically an authority given to do some one act or a series of acts on the land of another, without passing any estate in the land; as to hunt on another's land or to cut down a certain number of trees (*Cook* vs. *Stearns*, 11 Mass., 533; *Mumford* vs. *Whitney*, 15 Wend., 380, 390, 392).

"The words license and empower need not import anything different from grant. In their broad and general sense they are used indiscriminately. A mere license, strictly speaking, passes no interest, but only makes an action lawful which without it would have been unlawful; but if the instrument passes an interest, then it becomes a grant" (*Washburne* vs. *Gould*, 3 Story, C. Ct., 157).

Black's Law Dictionary, under the head of "License," gives the following:

"In real property, an authority to do a particular act or series of acts upon another's land, without possessing any estate therein; also the written evidence of authority so accorded. It is distinguished from an easement, which implies an interest in the land to be affected, and a lease, or right to take the profits of land. It may be, however, and often is, coupled with a grant of some interest in the land itself, or right to take the profits" (1 Wash. on Real Property, 398).

Under these authorities we respectfully submit that the right which the railroad company obtained under this Act of Congress does not rise to the dignity of an easement, but was a mere license, in the nature of a right-of-way, which did not convey any interest in the land; was not perpetual or for any definite period of time, and was revocable at the pleasure of the United States. The power of revocation being expressly reserved in the act itself, the railroad company cannot even claim the protection that the holder of an *executed* license may raise, where he has *expended money in carrying out the powers conferred.* Furthermore, that the licensee, having no interest in the land, the territory of Arizona cannot assess said property or levy a tax upon the same.

The present case is entirely unlike that of the *Fort Leavenworth Railroad Company* vs. *Lowe* (114 U. S., 525), and equally unlike the case of the *Utah & Northern R. R. Co.* vs. *Fisher* (116 U. S., 28). In the case first mentioned the State of Kansas, in ceding jurisdiction to the United States of the military reservation known as the Fort Leavenworth reservation in said State, expressly reserved:

"The right to serve civil or criminal processes within said reservation in suits for prosecutions for or on account of rights acquired, obligations incurred, or crimes committed in said State but outside of said cession and reservation;

and saving further to said State the right to tax railroad, bridge and other corporations, their franchises and property in said reservation."

Laws of Kansas, 1875, p. 95.

Under this cession the court held that:

"The right of the State to subject the railroad property to taxation exists as before the cession."

In the *Utah & Northern Ry.* vs. *Fisher*, the Indian title within the Fort Hall Indian reservation in the territory of Idaho was purchased by the United States from the Indians for the sum of $6,000, and, in consideration of the payment of that sum by the railroad company, and other conditions subsequent, the United States granted the said right-of-way and other property to the said railroad company (see 22 U. S. Stats. at Large, 148). The territory assessed said property and levied a tax thereon. The legality of the tax was upheld by this Honorable Court, and we do not see how it could have held otherwise, as in this case there was, beyond all question, an interest in the land granted to said company.

VI.

That the District Court of the 2d Judicial District of the territory of Arizona, in and for the county of Maricopa, had no jurisdiction as a territorial court to hear, try and determine this action.

That section 1910 of the Revised Statutes of the United States provides that each of the district courts in the territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming

"*shall have and exercise the same jurisdiction in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States;* and the first six days of every term of the respective District Courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the Supreme Court of each territory, as in other cases."

And it is claimed by this defendant that under the provisions of Title XXIII, "The Indians," Revised Statutes of the United States, and under the provisions of section 1851 of the Revised Statutes of the United States, and under the provisions of an act entitled, "An act to grant the Maricopa and Phœnix Railway Company of Arizona the right-of-way through the Gila River Indian reservation," passed and approved January 17, 1887, this action does arise under the Constitution and laws of the United States, as, under the provisions of said statutes of the United States, no assessment can be made or taxes levied upon the 6.24 miles of railroad lying within and on the Maricopa and Pima Indian reservation.

Section 1839 of the Revised Statutes of the United States reads as follows:

> "Nothing in this title shall be construed to impair the rights of persons or property pertaining to the Indians in any territory, so long as such rights remain unextinguished by treaty between the United States and such Indians, or to include any territory, which, by treaty with any Indian tribe, is not, without the consent of such tribe, embraced within the territorial limits or jurisdiction of any State or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of any territory now or hereafter organized, until such tribe signifies its assent to the President to be embraced within a particular territory.
>
> "SEC. 1840. Nor shall anything in this title be construed to affect the authority of the United States to make any regulations respecting the Indians, of any territory, their lands, property or rights, by treaty, law, or otherwise, in the same manner as might be made if no temporary government existed, or is hereafter established, in any such territory.
>
> "SEC. 1851. The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; *no tax shall be imposed upon the property of the United States*, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

In the case of *Gon-shay-ee*, 130 U. S., p. 343, at p. 347 the court said:

"It is very clear from these transcripts of the proceedings in the court below that on this trial it proceeded and considered itself as acting as a court for the trial of offenses arising under the Constitution and laws of the United States and as administering them with the same power as those vested in the Circuit and District Courts of the United States generally."

After reciting the circumstances of finding the indictment, and the trial and judgment of condemnation, in which it was declared to be rendered in the "District Court, Second Judicial District of Arizona, having and exercising the same jurisdiction under the Constitution and laws of the United States as is vested in the District and Circuit Courts of the United States," and then showing that if the prisoner had been committed and tried for an offense against the territorial law, that the prisoner would have been tried by a jury from the body of the county and summoned by its sheriff and by the court sitting in that county, and upon conviction would have been held by the sheriff, the Court said:

"All these circumstances are so variant in the nature of the jurisdiction and the mode in which it must be exercised that the conviction of the prisoner under the one mode by the law prescribed for the procedure under the other cannot be held to be within the power of the court which proceeded under the wrong jurisdiction.

"That there exists this system of a distinct jurisdiction, administered by the same court, in the territory of Arizona, as it does in nearly all the others, is undoubted."

And then quotes section 1910 of the Revised Statutes, and adds:

"It may be safely assumed that the practice of the territorial courts, from their first organization, has been to observe this separation of their functions. The payment of the expenses of the court, while sitting, as it declares in the caption above quoted, to administer the laws of the United States with the same jurisdiction as is vested in the Circuit and District Courts of the United States, is made by the Federal Government on accounts kept and rendered by its officers; while the same courts, when held within the different counties of the territories to administer the territorial laws, whether criminal or civil, are paid by the county, or in some other mode prescribed by the Legislature of the territory."

The following language was used by the court in *ex-parte Crow Dog*, 109 U. S., 556, 560:

> "The District Court has two distinct jurisdictions. As a territorial court it administers the local law of the territorial government; as invested by Act of Congress with jurisdiction to administer the laws of the United States, it has all the authority of Circuit and District Courts; so that, in the former character, it may try a prisoner for murder committed in the territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life (laws of Dakota, 1883, C. 9); and, in the other character, try another for murder committed within the Indian reservation under a law of the United States, which imposes, in case of conviction, the penalty of death."

In the case of *Starin* vs. *New York*, 115 U. S., 248, at page 257 the court said:

> "The character of a case is determined by the questions involved (*Osborn* vs. *Bank of United States*, 9 Wheat., 737, 824). *If from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the Act of 1875; otherwise not.* Such is the effect of the decisions on this subject."

Cohens vs. *Virginia*, 6 Wheat., 264, 379.
Osborn vs. *Bank of United States*, 9 Wheat., 737, 824.
The Mayor vs. *Cooper*, 6 Wall., 247, 252.
Gold Washing and Water Co. vs. *Keyes*, 96 U. S., 199, 201.
Tennessee vs. *Davis*, 100 U. S., 257, 264.
Railroad Co. vs. *Mississippi*, 102 U. S., 135, 140.
Ames vs. *Kansas*, 111 U. S., 449, 462.
Kansas Pacific vs. *Atchison Railroad*, 112 U. S., 414, 416.
Provident Savings Co. vs. *Ford*, 114 U. S., 635, 641.
Pacific Railroad Removal Cases, 115 U. S., 1, 11.

It is not claimed that the United States ever made a treaty with the Pima and Maricopa Indian tribes; and, under the

provisions of section 2079 of the Revised Statutes of the United States, no treaty can now be made.

Said section reads as follows:

> "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired."

This provision was embraced in the Act of Congress of 3rd March, 1871, vol. 16, statutes at large, page 566.

Down to the time of the passage of this last-named act, it had been the practice of the Government to make treaties with the various Indian tribes; but, as the Indians decreased in numbers many of the tribes thereby became so small, it was deemed advisable no longer to indulge in treaty making with them.

On January 28, 1859 (see 11th U. S. statutes at large, page 401), Congress for the first time recognized the Pina and Maricopa Indians.

Section 3 of said act reads as follows:

> "That the President of the United States be and he hereby is authorized and required to cause to be surveyed, and the boundaries thereof permanently marked, the tract or tracts of land lying on or near the Gila river in the territory of Arizona, New Mexico, now occupied by the confederated bands of Pima and Maricopa Indians, and the sum of $1,000 is hereby appropriated to defray the expenses of the said survey.
>
> "SEC. 4. That the President of the United States be and he hereby is authorized and required to set apart the tract or tracts of land aforesaid as a reservation for the confederated bands of Pimas and Maricopas; *provided*, that the said reservation shall not exceed 100 square miles in extent.
>
> "SEC. 5. That the sum of $10,000 is hereby appropriated to enable the Commissioner of Indian Affairs to make suitable presents to the Pimas and Maricopas in acknowledgment of their loyalty to this Government and the many kindnesses heretofore rendered by them to our citizens."

By the establishment of this reservation, the Indians thereon and the territory within the same is protected and governed under the provisions of title 28 of the Revised Statutes of the United States which relates to Indians.

Chapter I of said title concerns "Officers of Indian Affairs, Their Duties and Compensation;" Chapter II of said title relates to the "Performance of Engagements Between the United States and Indians;" Chapter III of said title relates to the "Government and Protection of Indians;" Chapter IV of said title relates to the "Government of Indian Country."

Under the provisions of this title the Indians and their reservations are fully protected from invasion by any person or persons whomsoever. Purchases or grants from the Indians are prohibited. The driving of stock, such as horses, mules or cattle, to range or feed on land belonging to any Indian or Indian tribe is prohibited under a penalty, and any person who makes a settlement on any lands belonging, secured or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey said land, or designate any of the boundaries by marking trees or otherwise, is liable to a penalty of one thousand dollars; and persons cannot trade with an Indian tribe without giving a bond in a sum not less than $5,000 or more than $10,000, conditioned that he will faithfully observe all laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same; and that he shall first procure a license therefor, which license may be revoked; and that trade when carried on within their boundary shall be limited to certain suitable and convenient places, to be designated from time to time by the superintendent, agents and sub-agents, and to be inserted in the license. And it is within the power of the President to prohibit the introduction of goods or of any particular article into the country belonging to any Indian tribe, and to direct all license to trade with such tribe to be revoked, and all applications therefor to be rejected.

That any person, other than an Indian, who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall also be liable to a penalty of $500, and forfeit all merchandise offered for sale to the Indians.

And every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent or sub-agent of the Indian Affairs or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after the expiration of such passport, shall be liable to a penalty of $1,000.

Various other provisions are made, and penalties imposed, for the infraction of numerous other provisions of the statutes. In other words, this title XXVIII of the Revised States, provides a complete plan for the government of Indian reservations and

the Indians thereon, and they are all subject to the laws of the United States and not at all subject to the laws of the territory in which said reservation is situated, hence any attempt by a territorial Legislature to impose a tax or other burthen on the Indians or the lands within a reservation is and must be null and void; as the sole power to govern the same is vested in the United States.

Down to March 3, 1885, all crimes committed upon the Indian reservations, except by an Indian upon an Indian, were triable in the courts of the United States and not in the territorial courts; but, on that day Congress passed an act entitled, "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June 30, 1886, and for other purposes" (23d Stat. L. 385).

It was enacted by section 9 of said act as follows:

> "SEC. 9. That immediately upon and after the date of the passage of this act, all Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson; burglary and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases. And all such Indians committing any of the above crimes against the person or property of another Indian, or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

Thus by the passage of the foregoing section, the crimes named therein and committed within a territory, whether within or without an Indian reservation, must be prosecuted under the laws of the territory, while all other crimes that may be committed within said reservation must be prosecuted under the laws of Congress, and that when the crimes are committed

within the limits of an Indian reservation within the boundaries of any State, the same will be prosecuted in the courts of the United States under the laws thereof.

This section of the Act of 1885 has been passed upon by this Honorable Court in the case of *The United States* vs. *Kagama*, 118 U. S., 375, in which it was held that while the Government of the United States has recognized in the Indian tribes heretofore a state of semi-independence and pupilage, it has the right and authority instead of controlling them by treaties, to govern them by acts of Congress, they being within the geographical limits of the United States and being necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact.

The States have no such power over them as long as they maintain their tribal relations,—the Indians owing no allegiance to a State within which their reservation may be established, and the State gives them no protection.

And it was held that the offense of murder committed within an Indian reservation in the State of California must be prosecuted in the courts of the United States.

Again, in the case of *Gon-shay-ee*, 130 U. S., page 343, it was held that under said act, the territorial courts established by the United States had jurisdiction to try the crimes described in said act, under territorial laws, when sitting as and exercising the functions of a territorial court, and not when sitting as and exercising the functions of a circuit or district court of the United States, under section 1910 of the Revised Statutes of the United States.

Again, in the case of the *United States* vs. *Thomas*, U. S. Rep., 151, page 577, this Honorable Court held that the Federal court in the State of Wisconsin had jurisdiction to try an Indian charged with murdering another Indian within an Indian reservation in said State.

At page 585 the court said:

> "The Indians of the country are considered as the wards of the nation, and whenever the United States sets apart any land of their own as an Indian reservation, whether within a State or territory, they have full authority to pass such laws and authorize such measures as may be necessary to give these people full protection in their persons and property, and to punish all offenses committed against them or by them within such reservations.
>
> "This subject was fully considered by this court in *United States* vs. *Kagama*, 118 U. S., 375."

Under these decisions it may now be regarded as settled law, that of the crimes mentioned in said Act of 1885, the territorial courts have jurisdiction of the persons charged with those offenses whether committed within or without an Indian reservation, and that the United States courts have jurisdiction to try persons charged with either of those offenses committed within such reservation and within the limits of a State.

For the errors heretofore assigned, appellant respectfully submits that said judgment of the Supreme Court of the territory of Arizona should be reversed in so far as it affirmed any portion of the judgment rendered by the District Court of the Second Judicial District of the territory of Arizona in and for the county of Maricopa.

H. S. BROWN,
Of Counsel for Appellant.